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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES HENRY MORRELL and
WILLIAM FRANCIS ELLIOTT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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October, 1986

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

I. WHETHER, IN A POST-TRIAL HEARING TO DETERMINE THE EFFECT OF OUTSIDE INFLUENCE ON A JURY PRIOR TO DELIBERATION, THE TRIAL COURT MAY CONSIDER THE SUBJECTIVE BELIEFS OF JURORS CONCERNING THAT EFFECT, OR THE LACK THEROF, ON THEIR VERDICT, IN DECIDING WHETHER THE GOVERNMENT HAS MET ITS BURDEN OF PROVING THE ABSENCE OF PREJUDICE TO THE DEFENDENTS BY SUCH OUTSIDE INFLUENCE?

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The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (a) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISION INVOLVED

The fundamental rights to a fair Trial and due process of law and to the effective assistance of counsel in such process is implicit in Article III, Section 2 of the United States Constitution, and is guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported at 799 F.2d 665 (11th Cir. 1986). That Opinion is set forth in its entirety in Appendix A-1 to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 15, 1986, affirming Petitioners' convictions herein. A timely Suggestion for Rehearing En Banc was filed. The Court of Appeals entered its Order denying the Suggestion for Rehearing En Banc on February 3, 1987 (Appendix B-1). This Petition is filed within sixty days of that decision and is timely filed.

STATEMENT OF THE CASE

The Indictment in this case centers around two separate marijuana smuggling ventures occuring in 1979, resulting in Federal Criminal charges of conspiracy to possess with intent to distribute marijuana (21 U.S.C. § (841) (a) (1)), and conspiracy to import marijuana (21 U.S.C. § 963). These Appellants were alleged in the Indictment to have a very limited role in the acts charged therein and specifically were alleged to be brokers of marijuana on what has become to be known in this case as the second load. The evidence against them essentially came from uncorroborated testimony of one witness, George Cottage. Since this Petition only concerns the jury tampering issue, no other facts are pertinent to this Petition, and therefore will not be recited herein.

On January, 23, 1985, prior to deliberations and the close of evidence in this case, Juror Adams came into the jury room early in the morning. She then related to a number of other jurors that a woman had come to her home the night before. Jurors Usher, Wester and Allen heard and later testified to the details of that contact and meeting. Other jurors heard of the contact as well.

Juror Adams was then sent to the Marshals, who took her to the Judge, where she repeated what had occurred the night before. This conversation took place outside the presence of the other jury members, Defendants, and their counsel. She stated that a woman came to her home and blew the horn and she answered the door. The woman, who was a stranger, said she was seeking employment at Juror Adams' place of employment in Madison, Florida and asked her help. Juror Adams told her she was on jury duty and did not know if her employer was hiring anyone at the time. The woman told her she was from Greenville, Florida, and worked at a store. The stranger then told Juror Adams that she knew the owner of the store because he was on trial. The stranger mentioned Co-Defendant JOE REAMS' name and his nickname, "JOE BALL". The woman told Juror Adams that REAMS was on trial in the case in which she was a juror for finding marijuana on his land and that he owned a lot of land and had no knowledge of the marijuana.

Juror Adams, who is black, described the stranger as a black woman in her thirties who she had never seen before or since. The Court asked if Juror Adams had said anything to any other jurors and Juror Adams lied and said no.

Judge Stafford then excused Juror Adams with no explanation to the Defendants, their counsel or to the other jurors, other than stating that a problem had developed overnight as to her.

The trial proceeded to the jury and the jury later returned verdicts of guilty on all Counts as to all Defendants.

Subsequent to the verdicts and outside the presence of, and without the knowledge of, the Defendants and their counsel, the Court conducted a post-trial individual juror interview on January 25, 1985. Approximately six of the jurors indicated then that they were aware of the contact with Juror Adams and three of the jurors heard Co-Defendant REAMS' name mentioned by Juror Adams.

Judge Stafford conducted another post-trial individual juror interview on March 22, 1985, with the Defendants and their attorneys present. The Court reassembled and brought in the jurors one at a time and questioned them. Eleven jurors and one alternate stated they had heard about the

contact with Juror Adams by the stranger at her home. Jurors Pierce, Jackson, Wester, Dooly, Usher and Allen had all heard the name of Co-Defendant REAMS mentioned. Only Juror Scarborough denied any knowledge of the incident. Over objection to this question, all jurors denied that the incident or contact or subsequent excusal of Juror Adams played any role in their verdicts. Jurors Jackson, Wester and Caputo also discussed the questions that arose in their minds after Juror Adams was excused by the Court with no explanation.

The Court then denied all Motions for New Trial and found that the Government had proved no prejudice to the Defendants which resulted from the off-the-record contact with Juror Adams and her disclosure of that contact to other jury members prior to the deliberations.

On March 27, 1985 the Trial Court sentenced both Appellants to identical sentences of four years imprisonment, pursuant to 18 U.S.C. § 4205(b)(2), a one year special parole term, and a $5,000 fine. Appellants remain at liberty on bond at this time, but are due to surrender on April 13, 1987 to commence service of their respective sentences.

REASONS FOR GRANTING THE WRIT

I. WHETHER, IN A POST-TRIAL HEARING TO DETERMINE THE EFFECT OF OUTSIDE INFLUENCE ON A JURY PRIOR TO DELIBERATION, THE COURT MAY CONSIDER THE SUBJECTIVE BELIEFS OF JURORS CONCERNING THAT EFFECT, OR THE LACK THEREOF, ON THEIR VERDICT, IN DECIDING WHETHER THE GOVERNMENT HAS MET ITS BURDEN OF PROVING THE ABSENCE OF PREJUDICE TO THE DEFENDANTS BY SUCH OUTSIDE INFLUENCE.

The decision of United States Court of Appeals for the Eleventh Circuit in this case represents a misapplication of the legal priniciples enunciated by this Court in Smith v. Phillips, 455 U.S. 209, 217, (1982), Remmer v. United States, 347 U.S. 227, 229-30 (1954), and Dennis v. United States, 339 U.S. 162, 169-72 (1950). This error requires reversal of the decision below, and the granting of a new trial for these Appellants.

The Eleventh Circuti affirmed Appellants' convictions solely "because the post-verdict interviews in the presence of the parties and their counsel demonstrate that the jurors were not prejudiced". See United States v. Adams, 799 F.2d 665 (11th Cir. 1986). Thus, in a nutshell, the Eleventh Circuit concluded that the jurors in this case were not prejudiced by the admitted outside influence attempted to be perpetrated on them because, in post-trial interviews, each juror said so. Unfortunately, the law is that each juror's subjective belief expressed at that late date simply cannot be the subject of inquiry, let alone the basis for a decision concerning such important Constitutional rights.

As correctly stated in the opinion of the Eleventh Circuit below, prior to the proceedings commencing on the day of closing argument, Trial Judge Stafford interviewed one of

the jurors, Lulu Adams, in his Chambers as a result of being informed by a United States Marshal that the juror had requested to speak with him. During that interview, which was transcribed, Juror Adams disclosed that she had been contacted on the previous night by a woman who had made reference to the trial and to the innocence of one of the Defendants, JOE REAMS. The Eleventh Circuit further set out the substance of the information provided to Judge Stafford at that hearing. Juror Adams misinformed Judge Stafford that she had not disclosed the incident to any other jurors, and, as a result thereof, Judge Stafford did not examine any other jurors then. When Court commenced, Judge Stafford simply informed the Defendants and their counsel that he excused Juror Adams because of "something that developed overnight".

The trial then continued to the verdicts. Thereafter, Judge Stafford interviewed individually the twelve jurors who had deliberated on the case. At that time, Judge Stafford learned that the excused juror had mentioned the incident in the Jury Room prior to informing the Court. The Court ordered transcripts of each of the interviews of each of the jurors including Juror Adams, and thereafter provided them to defense counsel. This post-verdict, post-interview release of the transcripts was the first knowledge or notice to Defendants and their counsel of the allegation of possible jury tampering and the investigation which had been conducted by the Trial Court to that point in time.

All defense counsel either filed or adopted Motions for a New Trial based upon the foregoing facts. Judge Stafford then held a hearing in the presence of Defendants and their counsel, at which time the Court solely questioned each juror individually concerning his or her knowledge of the outside influence attempted to be brought to affect Juror Adams. Although defense counsel had been permitted to offer pre-hearing written questions to the Court, most of these questions were not asked by the Court, and the Court alone conducted this inquiry.

During these preceedings, all Defendants and their counsel took the position that the Court could not ask the jurors any questions concerning the subjective effect of this attempted jury tampering on their decision, since such questions would be violative of Federal Rule of Evidence 606(b). Judge Stafford disagreed. All jurors stated in response to the Judge's inquiry, subjectively, that this incident had no such effect on his or her verdict.

Judge Stafford denied all Motions for a New Trial, concluding that the improper conduct did not bias the jury, essentially because each juror testified that such contact did not affect the deliberations and had no bearing whatsoever on the verdicts. The Eleventh Circuit's decision essentially adopted and affirmed Judge Stafford's factual finding of no prejudice, and, the subjective basis for such finding suggested by the jurors themselves.

In so doing, the decision in this case violated settled principles of applicable law in the Eleventh Circuit and in the United States Supreme Court, and did so by selective utilization of essentially dicta language employed by the United States Supreme Court, in prior decisions, and involving completely separate issues unrelated to the issue presented in this case. In this regard, the decision in this case violated binding precedent in the United States Court of Appeals for the Eleventh Circuit, that being the decision in United States v. Howard, 506 F.2d 865, 868-69 (5th Cir. 1975).

In Howard, the Fifth Cicuit vacated the Trial Court's denial of Appellants' Motion for a New Trial on the ground that, during deliberations, one of the jurors informed the others that Howard "had been in trouble two or three times before". No such evidence was presented at Howard's trial. In remanding the cause for further proceedings, the Howard Court reviewed the state of the law at that time concerning determination of such an issue. In short, citing Remmer v. United States, 347 U.S. 227 (1954), the Fifth Circuit remanded the cause to the District Court to conduct a hearing to determine the circumstances of the outside influence on the jury, and the prejudice, if any, that inured to

the Defendant as a result thereof.

In discussing the scope of such a hearing, the Howard Court unequivocally stated:

> "Well-established case law forbids the eliciting of juror testimony regarding the jury's mental processes, or the influences that any particular evidence had upon the jury's conclusion . . . However, it was established Federal Law as early as Mattox v. United States (citations omitted) that a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind". (Emphasis in original).

In its remand, the Howard Court ordered the District Court to "hold a hearing" to determine the accuracy of defendant's allegations, and further ordered the District Court, during such hearing, to "disregard those portions of the affidavit purporting to reveal the influence the alleged prejudicial extrinsic matter had upon the juror's mental processes". The Eleventh Circuit's decision in this case castrated the Howard decision.

Although not endorsing the procedure employed by the District Court prior to the hearing attended by counsel and the Defendants, citing United States v. Forrest, 620 F.2d 446 (5th Cir. 1980), the decision below nonetheless affirmed Appellants' convictions because of the subjective testimony provided by jurors in a permissible post-verdict hearing. In this regard, it should be recognized, as even the decision below did, that this case concerns the far end of the continuum involving cases of extrinsic influence imposed upon a Jury, which imposes a heavier burden upon the Trial Court to investigate, and upon the Government to demonstrate the absence of prejudice. In these circumstances, it has been clear since the decision in Remmer v. United States, 347 U.S. 227, 229 (1954), that an improper attempt to influence a jury such as occurred in this case is deemed "presumptively prejudicial", and that "the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the Defendant".

Simply put, under all of the circumstances involved in this case, the Government did not and cannot meet that heavy burden without improper reliance by the Court upon the subjective testimony of the jurors, in violation of the Remmer and Howard decision.

The opinion below in this case did not mention or discuss Howard. Rather, the Court based its conclusion that it could rely upon the subjective beliefs expressed by jurors in post-trial interviews on the decisions of the United States Supreme Court in Smith v. Phillips, supra; Remmer v. United States, supra; and Dennis v. United States, 339, U.S. 162 169-72 (1950). The Court erred in this case by misapplying language contained in the Phillips and Dennis decisions of the United States Supreme Court to the facts in this case.

In this regard, in footnote 4 at page 669 of its decision, the Court below concluded that the Trial Court could utilize subjective testimony of a juror in a post-trial interview to determine the question of prejudice to the Defendants imposed by the pre-deliberation outside influence. The Court below relied upon the decision of the United States Supreme Court in Smith v. Phillips, supra, 455 U.S. 209 at 217, 218, and particularly upon a quote contained therein from the decision in Dennis v. United States, to wit:

> "Surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter".

Simply put, the opinion in Dennis did not in any way involve an issue of jury tampering, or an allegation of outside influence imposed upon a jury after selection of a jury and during the course of a trial. Rather, the Dennis decision dealt with and permitted the Trial Court to allow jurors, during the voir dire and jury selection, to subjectively state their ability to be fair. Dennis did not deal with a post-verdict expression of subjective responses by jurors.

The Supreme Court in Smith v. Phillips supra, cited the foregoing sentence from the opinion in Dennis, but again in a

context dissimilar to that involved in this case. In this regard, in Smith v. Phillips, Defendant moved for a new trial post-verdict when he learned, for the first time, that one of his jurors had made a job application, during the course of the trial, to the office of the prosecuting attorney involved in this case.

The Phillips Trial Court concluded that no prejudice occurred as a result of this application. Nowhere in any of the opinions involving this issue is there any allegation that the juror making the job application informed any other jurors that he had done so. In addition, the facts involved in that case do not involve the application of extrinsic influence upon a jury: Smith v. Phillips only involved the question whether one particular juror was biased for reasons of his own.

Nonetheless, in reaching its conclusion that a new trial need not occur, the United States Supreme Court, in a footnote, and again in dictum as applied to this case, stated that Respondent errs in contending that the testimony of jurors given in post-trial hearings is inherently suspect by citing the foregoing statement of the opinion contained in Dennis v. United States.

Petitioners here contend that neither the Dennis nor the Phillips decision controls the facts of this case, and that the decision in Howard controls instead and should be adopted by this Court as binding precedent nationwide.

Analysis of all of the judicial decisions involving similar issues reflects a realistic attitude toward resolution of such issues applied by the various Appellate Courts. It is clear that a Trial Court, when faced with a question of extraneous influence during the course of a trial, should hold a full-blown hearing and examine each of the jurors concerning such extraneous influence, in the presence of all Defendants and their counsel, at the time the Judge first learns of it. It is also clear, as a matter of reality, that if the Trial Judge does not follow this preferred procedure, a post-trial "Remmer" Hearing can be held to perform essentially the same type of investigation. The difference is that although a Trial Judge may inquire of the jurors concerning their subjective beliefs prior to a verdict, Rule 606(b) precludes him from so doing in

a post-verdict interview. Thus by waiting until post-trial to conduct this hearing, Judge Stafford essentially precluded inquiry into an area that involves a legislative choice that one simply cannot put credence in a comment made by a juror after a verdict already had been returned concerning the effect of any particular issue or thing upon the decision-making process.

In this regard, Congress specifically concluded that testimony concerning the subjective effect of one thing or another on a juror's deliberations, taken after the verdict, was inherently suspect, and to permit such testimony would create an environment inviting jury tampering and the reopening of verdicts. Thus, what Judge Stafford attempted to do here not only was "too little and too late", but was totally improper. The opinion below incorrectly relied upon that attempt as the benchmark of its decision in this case, for without that reliance the law clearly required reversal of all convictions and remand for a new trial.

Rule 606(b) of the Federal Rules of Evidence clearly precludes inquiry concerning the subjective effect of particular occurrences on deliberations, by stating that, with respect to an inquiry into the validity of a verdict, "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . ... or concerning his mental process in connection therewith". In short, that rule provides that jurors may be examined concerning what happened in the Jury Room insofar as the presence or absence of extraneous influence, but may not be examined on the effect that such influence may or may not have played upon their verdict. The decision of the Eleventh Circuit in United States v. Howard accurately interpreted that rule, and the opinion below in this case can, in no way, be reconciled with the decisions in Howard and Remmer, or with Rule 606(b).

As applied to the facts of this case, the foregoing decisions of this Court, as well as the decision of the United States Court of Appeals for the Eleventh Circuit in United States v.

Howard, supra, require that the following process be employed in determining whether a new trial should be ordered:

1. If the extraneous influence on the jury suggests an attempt at tampering with the jury,as occurred here, the Trial Court must conduct an investigation and a hearing in which Defendants and their counsel are present and permitted to participate. United States v. Caldwell, 776 F.2d 989, 997-98 (11th Cir. 1985).

2. The better practice is to conduct such a hearing at the precise time the court becomes aware of the existence of extraneous influence upon the jury. United States v. Forrest, 620 F.2d 446, 456-59 (5th Cir. 1980), United States v. Herring, 568 F.2d 1099, 1104-06 (5th Cir. 1978).

3. If the Trial Court does not conduct the hearing prior to the verdict, the verdict may possibly be sustained by conducting a full blown post-trial hearing attended by Defendants and their counsel and in which counsel participates. Remmer v. United States, 347 U.S. 227, 229 (1954).

4. In cases like the present one, involving a post-trial hearing concerning jury tampering issues, prejudice will be presumed and the Government will bear the burden of proving harmless error. Remmer v. United States, 347 U.S. 227, 229 (1954).

5. During such a post-trial hearing, the jurors may not be examined, and the Court may not consider, the subjective effect upon the verdict caused by outside influence, but may only determine whether such outside influence existed, and what it was. United States v. Howard, 506 F.2d 865, 868-69 (5th Cir. 1975).

Applying the foregoing procedure to this case, it is clear that extraneous influence of a jury tampering nature occurred and required investigation and a hearing. It is also clear that Judge Stafford did not conduct the type of hearing required by the foregoing decisions until after the verdict, making it a Remmer-type hearing. It is also clear that Judge Stafford violated settled principles of law by inquiring into the subjective effect on the jurors of the outside influences in

the Remmer-type hearing conducted. Finally, it is clear that the opinion below in this case rested upon the result of the information provided by the jurors in that hearing concerning the subjective effect upon them. Other than such subjective testimony, the Government presented absolutely no evidence to sustain its burden of proving harmless error at the hearing. Since both the Trial Court and Appellate Court in this case improperly considered this subjective evidence in arriving at the decision, and since the Government did not overcome its burden of proving harmless error, a new trial must be awarded consistent with the decisions in United States v. Howard and United States v. Remmer, supra.

CONCLUSION

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case ignored prior precedent of that Court in the form of United States v. Howard, supra. In addition, the opinion below misapplied dicta employed by the United States Supreme Court in Smith v. Phillips, supra, relating to a different scenario, to the facts of this case. The result is that the opinion of the United States Court of Appeals for the Eleventh Circuit in this case misapplies established, prior precedent of this Court and requires reversal of Petitioners' convictions.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 3rd day of April, 1987, to BARBARA SCHWARTZ, Assistant U.S. Attorney, 227 North Bronough Street, Suite 4101, Tallahassee, Florida 32301; L. SANFORD SELVEY, II, ESQUIRE, 1105 Hays Street, Tallahassee, Florida 32301; JUDITH DOUGHERTY, ESQUIRE, 906 Thomasville Road, Tallahassee, Florida 32303; ARMANDO GARCIA, ESQUIRE, 317 East Park Avenue, Tallahassee, Florida 32301; and H.B. EDWARDS, III, ESQUIRE, 108 East Valley Street, Valdosta, Georgia 31601.

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APPENDIX A-1

UNITED STATES v. ADAMS

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jimmie Richard ADAMS, William Francis Elliott, James Henry Morrell, Jr., Elba Pintado-Otero, Luciano Morra, William Hinton Hockaday, Larry Henton Hockaday, James W. McMullen, Jerry Gray Hockaday, Defendants-Appellants.

No. 85-3315.

United States Court of Appeals,
Eleventh Circuit.

Sept. 15, 1986.

The defendants were convicted in the United States District Court for the Northern District of Florida, No. TCR 84-07029, William Stafford, Chief Judge, of drug-related offenses, and they appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, sitting by designation, held that: (1) defendants' constitutional right to be present at every stage of criminal proceddings was not violated by trial court's ex parte interview of a juror who disclosed an improper jury contact during trial: (2) evidence, which demonstrated that defendant accompanied a codefendant to Georgia on two separate occasions for the purpose of brokering imported marijuana, was sufficient to support the defendant's conviction for conspiracy to possess marijuana and possession of marijuana with intent to distribute; and (3) circumstances of defendant's presence in vehicle transporting a substantial quantity of marijuana demonstrated that she was part of a conspiracy to possess and possessed marijuana with intent to distribute.

Affirmed.

1. Criminal Law — 636(1), 1166.14

Defendants' constitutional right to be present at every stage of criminal proceedings was not violated by trial court's ex parte interview of a juror who disclosed an improper jury contact during trial; although better practice would have been to notify the parties and their counsel immediately upon learning that the juror had been improperly contacted, failure to do so and failure to examine immediately the other jurors in the presence of parties and their counsel did not constitute reversible error where the other members of the jury were not prejudiced by the improper contact.

2. Criminal Law — 868

Postverdict interviews are constitutionally sufficient to decide allegations of juror impartiality.

3. Criminal Law — 919(3)

When prosecutor voices a personal opinion but indicates that such belief is based on evidence in the record, the comment does not require a new trial.

4. Criminal Law — 1169.5(2)

Any prejudice resulting from a witness' improper reference to telephone calls made to known drug smugglers was cured by a trial court's immediate curative instruction and minimized by the fact that the remark was not repeated or referred to thereafter.

5. Criminal Law — 1169.5(1)

When evidence is withdrawn from jury with an instruction to disregard it, the error is cured unless the evidence is so highly prejudicial as to render the error incurable.

6. Criminal Law — 675

Witnesses — 374(1)

Medical record, which would have indicated that prosecution witness lied about date of his child's birth, was not admissible to impeach the witness by showing that the witness had an additional motive to obtain an early release from prison to be with his child; furthermore, cross-examination of the witness sufficiently demonstrated his motivation to cooperate with prosecution so that the evidence sought to be admitted was merely cumulative.

7. Conspiracy — 47(12)

Drugs and Narcotics — 123(2)

Evidence, which demonstrated that defendant accompanied a codefendant to Georgia on two separate occasions for the purpose of brokering marijuana, was sufficient to support the defendant's conviction for conspiracy to possess marijuana and possession of marijuana with intent to distribute.

8. Conspiracy — 47(12)

Drugs and Narcotics — 123(2)

Circumstances of defendant's presence in vehicle transporting a substantial quantity of marijuana demonstrated that she was part of a conspiracy to possess and possessed marijuana with intent to distribute.

9. Conspiracy — 47(12)

Drugs and Narcotics — 123(2), 124

Evidence, which placed defendant at the stash site and showed that he and two others were partners or master-minds in a criminal venture, exercising control over the marijuana, was sufficient to support his conviction of conspiracy to import and importation of marijuana with respect to the first importation; furthermore, evidence was sufficient for jury to have inferred beyond a reasonable

doubt that defendant engaged in the continuing conspiracy to possess marijuana as well as the second importation and possession of marijuana.

Appeals from the United States District Court for the Northern District of Florida.

Before RONEY and CLARK, Circuit Judges, and GIBSON*, Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

The appellants challenge their narcotic related convictions on several grounds, including improper jury contact, prosecutorial misconduct, and sufficiency of the evidence. For the reasons discussed below, we affirm their convicitons.

The government secured an eight count indictment charging nineteen individuals with various narcotics crimes as a result of their participation in a marijuana smuggling operation. The case involves two separate importations of marijuana. The first occurred in September 1979 and involved the vessel "Christine." The Christine sailed to the Caribbean where it met a large ship that was carrying several thousands pounds of marijuana. The Christine took on 6,000 pounds of marijuana and sailed for Florida. The vessel anchored about twelve miles off the shore of Steinhatchee, Florida. A helicopter off-loaded the marijuana and transported it to a "stash-site" near Greenville, Florida. The second importation occurred in October 1979 and involved a freighter that was anchored off the coast of northern Florida. The freighter had on board several thousand pounds of marijuana. The marijuana was off-loaded by helicopter and by small boats, and taken to the stash site. Twelve of the

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

nineteen individuals named in the indictment were tried and convicted by a jury for their participation in these importations. Nine of those twelve defendants now appeal.[1]

1. IMPROPER JURY CONTACT

All nine appellants take issue with the district court's[2] ruling on the "improper jury contact" issue. Before proceedings resumed in the morning of the day on which closing arguments were given, the trial judge was informed by the marshal that one of the jurors had requested to speak to the judge. Juror Adams was brought to the judge's chambers where, in the presence of the judge, his court personnel, and the court reporter, Juror Adams disclosed that she had been contacted on the previous night by a woman who made reference to the trial and to one of the defendants, Joe Reams.[3] After discussing the details with the judge, Adams stated that she had not mentioned the incident to the other jurors. The judge excused Adams and replaced

1. Appellants Adams, Elliott, Morrell, Pintado-Otero, the Hockadays, and McMullen were convicted of conspiracy to possess and possession of marijuana with the intent to distribute. *See* 21 U.S.C. §§ 841, 846; 18 U.S.C. § 2. Pintado-Otero was also convicted of unlawfully carrying a firearm during the commission of a felony. *See* 18 U.S.C. § 924(c). Appellant Morra was convicted of conspiracy to import marijuana and conspiracy to possess marijuana with the intent to distribute. He was also convicted on two counts of importation of marijuana, and on two counts of possession of marijuana with the intent to distribute. *See 21 U.S.C.* §§ 952, 960, 963, 841 and 846; 18 U.S.C. § 2.

2. Honorable William Stafford, United States Chief District Judge for the Northern District of Florida.

3. The relevant portion of the judge's discussion with Juror Adams follows:

> JUROR ADAMS: Well, this lady came to my house last night, I don't know what time it was. . . . She told me that she was trying to get a job at Dixie Packers, that's where I work in Madison.

her with an alternate pursuant to Fed.R.Crim.P. 24(c). Adams was instructed not to discuss the incident with anyone. To avoid her having any contact with the jury, the judge had Adams wait in his chambers until the jury returned to the courtroom, at which time Adams left the courthouse. When proceedings resumed, the judge informed the parties and their counsel, outside the presence of the jury, that he had excused and replaced "the Juror Lulu Adams because of a matter that developed overnight that she brought to my attention." No inquiry was made by the government or by the defendants. When the jury was brought into the courtroom, the Judge repeated that Juror Adams was excused because of "something (that) developed overnight."

After the jury returned its verdicts, the judge interviewed the jurors individually and without counsel present. The

> Somebody told her . . . . where I lived at and I worked at Dixie Packers, and told her to come and talk to me about was they hiring at this present time at Dixie Packers. Well, I told her that I didn't know because I hadn't been to work in about two weeks and I didn't know was they hiring. I said I was going to Tallahassee every day on trial, on jury duty. . . . And she come in and she said, oh, well — I asked her where she was from. She told me she was from Greenville and she had been working — she was a store manager at some store, and the man that owned the store was selling it, and that she was trying to find her another job, and she asked me was they hiring. And she said that the man — after I told her about I was going to Tallahassee, you know, that I didn't know about was they hiring at the time or not, then she said "Well, maybe you know the man who owns the store because he's on trial up there." I said, "No, I don't think I do." And she said, "Well, his name is Joe Reeves (sic)." I said, "No I haven't heard of that name." And she said, "Well they call him Joe Ball." And she said, "He owned the store that I worked at, that I was store manager, and he's selling the store." And he told her that they had him on trial for finding marijuana on his land and that he didn't know nothing about it cause he had so many acres of land that he didn't know that marijuana was on his land, but they was trying to send him off for it. I said, "Well, I don't know him, no, because I'm not on that trial." And I got off the subject . . . .
>
> . . . .

judge learned that Juror Adams had in fact mentioned the incident in the jury room minutes before she disclosed to the judge that she had been contacted. The judge learned that when Adams arrived at the courthouse that morning, she began discussing the incident with a few jurors, but was stopped by the jurors when she revealed that the woman who approached her mentioned the trial and defendant Joe Reams. The other jurors told Adams to see the judge immediately about the incident. Adams then left the jury room and requested to see the judge. Transcripts of these post-verdict interviews and the interview with Juror Adams were prepared and given to the parties.

After counsel has an opportunity to review these transcripts, the court again interviewed the jurors separately, but with the parties and their counsel present. Counsel were allowed to submit questions to the judge, who questioned the jurors. The interviews revealed that two of the twelve jurors did not know that a juror had been contacted. The other ten jurors were aware to various degrees that Adams had been contacted. Five jurors knew

> And then when she was going out the door, she said, "Well, you listen when you go back up there," she said, "You listen for his name and maybe you'll know him and then maybe you could help him, then I won't have to find me another job because I could still keep my job, because he said he didn't do it, he didn't know nothing about it." And she left.
>
> THE COURT: Did you recognize the lady?
> JUROR ADAMS: No, I didn't know her at all. . . . .
> THE COURT: Did she — did you mention the jury service first?
> JUROR ADAMS: Yeah, I did.
> THE COURT: Uh-huh. And then that's when she —?
> JUROR ADAMS: That's when she said, "Well, maybe you know him, the man that owns the store, maybe you know him because he's on trial up there," and she said, "Joe Reeves," I said, no, no, I don't know him." She said, "Joe Ball, they call him Joe Ball." I said, "No, I don't think —" I said, "No, I'm not on that trial."
>
> THE COURT: Have you said anything to any other jurors?
> JUROR ADAMS: No . . . .
> Record XXXII at 2-7.

that she had been contacted, but were unaware that a name had been mentioned. The other five jurors knew that she had been contacted and that Reams' name was mentioned. The alternate also knew of a contact, but was unaware of any names mentioned.

The court found that the jury's deliberations were not biased by the improper contact. The jurors testified that after Adams left the jury room the incident was never again discussed. Each juror testified that the improper contact did not affect the deliberations and had no bearing whatsoever on the verdicts. The court noted that the jurors were candid and forthcoming in their responses to the questions. No juror hesitated or was reluctant in answering. The court concluded that the defendants were not prejudiced, and denied all motions for mistrial and new trial.

The appellants contend that they were deprived of their constitutional right to be present at all stages of the trial and their parallel right pursuant to Fed.R.Crim.P. 43 when the court interviewed Juror Adams and the other members of the jury outside their presence and the presence of counsel. The appellants also contend that the court erred in not examining each juror in the presence of counsel immediately upon discovering that Juror Adams had been contacted. Finally, they contend that the court erred in denying their motion for new trial because they were prejudiced by the improper contact.

(1) We hold that the appellants' constitional right to be present at every stage of the criminal proceedings was not violated by the court's interview of Juror Adams. " '(T)he mere occurence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right.' " *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) (quoting *Rushen*

v. Spain, 464 U.S. 114, 125-26, 104 S.Ct. 453, 459-60, 78 L.Ed.2d 267 (1983) (Stevens, J., concurring in judgement). *See United States v. Watchmaker*, 761 F.2d 1459, 1466 (11th Cir. 1985) (where trial judge took great care in framing his comments, where transcripts were made available to counsel and were post judgement motions provided opportunity to explore any possible prejudice, there was no due process violatio), *cert. denied*, — U.S. —, —, 106 S.Ct. 879-80, 88 L.Ed.2d 917, 917 (1986). We also hold that although the better practice would have been to notify the parties and their counsel immediately upon learning that Adams had been improperly contacted, the failure to do so and the failure to examine immediately the other jurors in the presence of the parties and their counsel does not constitute reversible error in this case because in any event the other members of the jury were not prejudiced by the improper contact. The post-verdict interviews in the presence of the parties and their counsel sufficiently demonstrate this absence of prejudice. The district judge should be afforded a considerable measure of discretion in handling these inadvertent situations.

This court recently reviewed the relevant case laws in *United States v. Caldwell*, 776 F.2d 989, 997-98 (11th Cir.1985), and concluded that the cases fall along a continuum. At one end, the cases focus on the seriousness of the accusation of impropriety. "The more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate." *Id.* at 998 (citing *United States v. Brantley*, 733 F.2d 1429 (11th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1362, 84, 84 L.Ed.2d 383 (1985); *United States v. Phillips*, 664 F.2d 971 (5th Cir.1981), *cert. denied*, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982); *United States v. Forrest*, 620 F.2d 446 (5th Cir.1980)). We are concerned here with the latter end of the continuum and are guided by *United States v. Brantley* and *United States v. Phillips*.

Forrest involved a similar contact to that involved in the case at the bar. Prior to closing arguments a juror in the *Forrest* case told the trial judge that she was approached by her niece in an effort to influence her to acquit the defendants. The discussion between the juror and the judge, however, took place in the judge's chambers in the presence of counsel for both parties. The tainted juror assured the judge that the other jurors did not know of the contact. The court excused and replaced the juror, but did not examine the other jurors. The defendants were convicted. On appeal, the Fifth Circuit remanded for a hearing to determine whether the other members of the jury were prejudiced. The court of appeals held that the trial court's investigation into the improper contact was inadequate, and that a tainted juror's testimony that the other jurors knew nothing about the improper contact is an insufficient basis on which to conclude that the other jurors have not been contaminated. *Forrest*, 620 F.2d at 457-58. "Only the other jurors can enlighten (the court) properly on the subject." *Id.* at 457.

(2) The appellants contend that the *Forrest* examination of the other jurors in this case should have taken place before rather than after the verdicts were rendered. Although *Forrest* can be read to suggest that the examination of the jurors should have taken place if possible before the verdicts are rendered, failure to do so in this case is not reversible error because the post-verdict interviews in the presence of the parties and their counsel demonstrate that the jurors were not prejudiced. Such post-verdict interviews are constitutionally sufficient to decide allegations of juror impartiality. *See Smith v. Phillips*, 455 U.S. 209, 217-18, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982); *Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954).[4] "The crucial issue is the degree and pervasiveness of

4. Appellants argue that testimony of a juror is inherently suspect in these circumstances. The Supreme Court rejected a similar argument in *Smith v. Phillips*, *supra*, and noted that "surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." 455 U.S. at 217 n. 7, 102 S.Ct. at 946 n. 7.

the prejudicial influence." *United States v. Williams*, 568 F.2d 464, 470 (5th Cir.1978). We have reviewed the transcript of the post-verdict interviews and conclude that the district court's findings are not clearly erroneous. The jurors were not prejudiced by the improper contact. We hold, therefore, that the district court did not abuse its discretion in denying the motions for new trial on the basis of improper jury contact.

II. PROSECUTORIAL MISCONDUCT

(3) The appellants contend that the following remarks made by the prosecutrix during the rebuttal portion of her closing arguments denied them a fair trial:

MS. SCHWARTZ (Prosecutrix): And as Bart Carver told you, dope dealers deal with dope dealers, and you have to know, you don't find a swan in the sewer, and that's what you get when —. (objection) (sustained)

Record XXXIII at 86.

MS. SCHWARTZ: I believe that the Government has proven, with the testimony and the evidence, that the Defendants are guilty beyond a reasonable doubt. (objection)

THE COURT: Continue.

Record XXXIII at 98-99. The appellants argue that the comment about "dope dealers" and "sewers" was inflamatory because it depicts the defendants as drug dealers emanating from the sewer. Their argument is without merit. The appellants have taken the prosecutrix' statement out of context. The record clearly indicates that the prosecutrix was not referring to the defendants. Rather, she was referring to the government witness, whose credibility had been attacked by defense counsel on cross-examination and in closing arguments. The prosecutrix was merely reminding the jury that the government had conceded all

along that its witnesses were drug dealers. Record XXXIII at 85. With respect to the remarks concerning the guilt of the defendants, the appellants contend that the prosecutrix' expression of her personal opinion denied them a fair trial. We disagree. "When the prosecutor voices a personal opinion but indicates this belief is based on evidence in the record, the comment does not require a new trial." *United States v. Granville*, 716 F.2d 819, 822 (11th Cir.1983), *aff'd on rehearing*, 736 F.2d 1480 (11th Cir.1984). A prosecutor may say, " 'I believe the evidence has shown the defendant's guilt, (but not,) I believe the defendant is guilty.' " *United States v. Morris*, 568 F.2d 396, 402 (5th Cir.1978) (citations omitted). The prosecutrix' statements in the case at bar are consistent with those allowed in *Granville* and *Morris*. We conclude, therefore, that the prosecutrix' comments were within permissible bounds.

(4) Appellant Pintado-Otero contends that the district court is denying her motion for a mistrial as a result of the following statement by a government witness:

I was told over the radio or telephone, I forget, when I was called to set up surveillance, that we had a group of Latins that were probably in town to do a dope deal and that they were making phone calls to known dopers in Miami or somewhere south.

Record XXI at 130. This statement was made despite the district court's previous instruction to the government that its witnesses were not to testify that telephone calls were made to "known drug smugglers." Pintado-Otero argues that the witness' remark implies that Pintado-Otero, one of only two Latin defendants, was a narcotics dealer from Miami, making phone calls to her cohorts — "known dopers." Pintado-Otero argues that the government produced no evidence, however, that she was involved in any prior narcotics transactions. Pintado-Otero concludes that consequently the remark was prejudicial.

(5) We hold that the district court properly denied the motion for mistrial. When the evidence is withdrawn from the jury with an instruction to disregard it, "the error is cured unless the evidence is so highly prejudicial as to render the error incurable." *United States v. Benz*, 740 F.2d. 903, 916 (11th Cir.1984), *cert. denied*, — U.S. —, 106 S.Ct. 62, 88 L.Ed.2d 51 (1986). The testimony in this case was not so highly prejudicial as to render the error incurable. Indeed, any prejudice as a result of the remark was cured by the court's immediate curative instruction, Record XXI at 145, and minimized by the fact that the remark was not repeated or referred to thereafter. *See United States v. Hernandez*, 750 F.2d 1256, 1259 (5th Cir.1985) (in reversing conviction the court emphasized that no instruction was given to disregard the testimony and the prosecutor attempted to exploit the prejudicial testimony in closing arguments).

III. IMPEACHMENT EVIDENCE

(6) Appellants McMullen and the Hockadays were convicted of conspiracy to possess and possession of marijuana with the intent to distribute. Coconspirator and government witness M.L. Tucker implicated the defendants in these crimes. Through cross-examination defense counsel revealed that Tucker was serving time in prison for other crimes when he agreed to cooperate with federal officials in return for his early release from prison and immunity from prosecution for his involvement with the appellants in this case. Also on cross-examination, Tucker was asked whether his wife gave birth to their child while Tucker was in prison. Tucker responded that his child was born after he was released from prison. As part of the defendants' case, appellant Jerry Hockaday attempted to introduce a hospital medical record through the testimony of the hospital records custodian. The medical record indicated that a woman gave birth to a child on September 9, 1982, while Tucker was in

prison, and stated that Tucker was the father. Defense counsel argued at trial that the medical record was relevant for two reasons: first, it demonstrated that Tucker lied on cross-examination about the date of his child's birth; and second, it revealed that Tucker had an additional motive to obtain early release from prison — to be with his child. The court sustained the government's objection that this was impeachment evidence as to a collateral matter. The appellants contend that the court erred in refusing to admit the record into evidence.

We hold that the district court did not err in refusing to admit the medical record. The birth date of Tucker's child is clearly a collateral matter on which Tucker cannot be impeached by extrinsic evidence. *See United States v. Russell*, 717 F.2d 518, 520 (11th Cir.1983). Further, although the importance of exposing a witness' motivation to cooperate with the prosecution has been long recognized in this circuit, *see generally Jenkins v. Wainwright*, 763 F.2d 1390, 1392 (11th Cir.1985) (and cases cited therein), *cert. denied*, — U.S. —, 106 S.Ct. 2290, 90 L.Ed.2d 730 (1986), we believe the cross-examination of Tucker sufficiently demonstrated his motivation to cooperate with the prosecution so that the evidence sought to be admitted was merely cumulative.

IV. SUFFICIENCY OF THE EVIDENCE

Appellants Elliott, Otero, and Morra challenge the sufficiency of the evidence against them. We review the evidence against the appellants in the light most favorable to the government, drawing all reasonable inferences in favor of the jury's verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

(7) Appellant Elliott was convicted of conspiracy to possess marijuana and possession of marijuana with the intent to distribute. The government's evidence against Elliott consists of the testimony of the coconspirator and

government witness, George Cottage. Cottage testified that he had known Lem North, one of the masterminds of the scheme to import marijuana, for several years. In September 1979, North invited Cottage to meet North in Valdosta, Georgia, for the purpose of "brokering" the marijuana from the first importation. Cottage invited appellants Elliott and Morrell along, explaining to them the purpose of the trip. Morrell drove. The trip was unsuccessful, however, and the three returned to Florida. In November 1979, after the second importation and upon Morrell's request, Cottage accompanied Morrell and Elliott to Valdosta, Georgia, to meet Lem North again. Before they checked into their hotel rooms, Elliott, Morrell, and Cottage met with North. North offered them a sample (threefourths of a pound) of marijuana for their prospective customers. Morrell took the sample and he and Elliott went to their adjoining hotel rooms. When Cottage arrived the prospective buyers were already in the rooms. Shortly thereafter, the police entered the rooms and found Morrell, Elliott, and Cottage together with the prospective buyers and the sample of marijuana. The strong odor of marijuana burning was present in the room. The sample matched the marijuana found at the stash site.

Elliott argues that this evidence only demonstrates his " 'mere presence' in a suspicious climate." We disagree.

For Elliott to be convicted of conspiracy to possess marijuana with the intent to distribute, "the government was required to prove beyond a reasonable doubt the existence of a conspiracy, his knowing participation in it, and his criminal intent." *United States v. Cruz-Valdez*, 773 F.2d 1541, 1544, (11th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1272, 89 L.Ed.2d 580 (1986). For Elliott to be convicted of the possession charge, "the government's burden was to prove beyond a reasonable doubt that he knowingly possessed the marijuana, either actually or constructively, and that he intended to distribute it." *Id.* We agree with Elliott that "mere presence" is insufficient to establish guilt on these

charges. As this court recently recognized in *Cruz-Valdez*, however, the evidence in these cases "establishes not mere presence but presence under a particular set of circumstances." *Id.* at 1545. We hold that from the circumstances in this case the jury could find Elliott guilty beyond a reasonable doubt as charged. *See United States v. Walker*, 720 F.2d 1527, 1538 (11th Cir.1983) (the existence of a conspiracy may be proved by circumstantial evidence, including inferences from the conduct of the alleged participants), *cert. denied*, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). The evidence demonstrated that Elliott accompanied Morrell to Valdosta not once but on two separate occasions for the same purpose — to broker the imported marijuana. The logical inference to be drawn from this evidence is that Elliott and Morrell had agreed to broker the marijuana and were knowingly participating in that agreement. Elliott accompanied Morrell to North's hotel room where Morrell, Elliott's coconspirator, obtained a sample. Both Elliott and Morrell then met their prospective buyers, who sample the marijuana. We believe that the jury also could have reasonably inferred that Elliott together with Morrell possessed the marijuana with the intent to distribute.

(8) Appellant Pintado-Otero was convicted of conspiracy to possess marijuana with the intent to distribute, possession of marijuana with the intent to distribute, and the unlawful carrying of a firearm during the commission of a felony. The evidence against Pintado-Otero consists of the testimony of a Florida Marine Patrol Office, and a coconspirator and government witness, Myra Labrador. Labrador testified that she was hired to accompany a man while he drove a motor home that was heavily loaded with marijuana. man-and-woman combinations were neede to give the appearance of a "couple" vacationing in a motor home. Labrador testified that several other "couples" were hired to transport the marijuana in the same way. Labrador stated that she was placed in the back of a motor home with several others and taken to what was later identified as the stash site. Labrador

identified appellant Pintado-Otero as one of the people in the motor home. When they arrived at the stash site, the "couples" were assigned different motor homes. The motor home in which Pintado-Otero was riding was followed from the stash site by the Florida Marine Patrol Officer who testified that Pintado-Otero's vehicle would not stop until it approached a roadblock. The officer directed the passengers, Pintado-Otero and her daughter, to step out of the vehicle. While he was directing the driver to step out, the officer noticed Pintado-Otero place her hand on her purse. The officer instructed Pintado-Otero not to move while he removed from Pintado-Otero's purse an automatic pistol, which was loaded and ready to fire.

Pintado-Otero argues that her mere presence in a vehicle transporting marijuana that was only accessible from the rear of the vehicle is insufficient to prove that she conspired to possess and possessed marijuana with the intent to distribute. Because these convictions must fall, her argument continues, so must the firearm conviction. We disagree.

The circumstances of Pinta-Otero's presence in the vehicle transporting a substantial quantity of marijuana demonstrate that she was part of a conspiracy to possess and possessed marijuana. Pintado-Otero was among those people taken to the stash site for the purpose of transporting large quantities of marijuana out of Florida in motor homes. Her presence was essential to the success of the ruse — to give the appearance of a couple vacationing in a motor home. She wa arrested in a motor home heavily loaded down with marijuana. The strong odor of marijuana was present in the cab of the motor home. The logical inference to be drawn from this evidence is that a conspiracy to possess the marijuana with the intent to distribute existed and that Pintado-Otero knowingly participated in it. In these particular circumstances, Pintado-Otero had no more or no less control over the progression and destination of the motor home and its contents than did the driver. Consequently,

they shared at least constructive possession of the marijuana. *See United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir.1974). We hold that the evidence is more than sufficient for the jury to have inferred beyond a reasonable doubt that Pintado-Otero engaged in a conspiracy to possess and possessed marijuana with the intent to distribute.

(9) Appellant Morra was convicted of conspiracy to import marijuana, conspiracy to possess marijuana with the intent to distribute, two counts of importation, and two counts of possession. John Thomas, who piloted the Christine, which was involved in the first importation, testified for the government that he was hired by appellant Morra to import the marijuana from the Caribbean to Florida. Morra told Thomas and a man named Bart Carver that the load was 20,000 pounds. Carver secured a vessel, the Christine, and prepared it for the first importation. When it was ready, the Christine sailed for the Caribbean. The vessel developed mechanical problems, and Thomas contacted Morra and defendant Ronnie Fripp, who sent a mechanic. On Morra's instructions, Thomas sailed the Christine to the rendevous with another ship where the Christine took on the 6,000 pounds of marijuana. When the Christine returned to Florida and arrived off the coast of Steinhatchee, Morra communicated with Thomas from a plane that circled above the vessel. Carter corroborated Thomas' testimony, adding that Morra and Fripp were partners and that Morra assured him that there would be additional loads. Patrick Harrell estified that he was hired to "sit on the stash site." Harrell met Morra, who Harrell stated was at the stash site when the marijuana was unloaded by the helicopters. Harrell testified that Morra, Fripp, and North were the masterminds of the scheme to import marijuana.

Morra concedes that the jury could have found him guilty beyond a reasonable doubt of conspiracy to import and importation of marijuana with respect to the first load. He argues that the evidence is insufficient, however, to support

his conviction for possession of marijuana with the intent to distribute with respect to the first load. Morra's argument is without merit. The evidence places Morra at the stash site and shows that he, Fripp, and North were partners or the masterminds in the criminal venture, exercising control over the marijuana. The logical inference is that he along with Fripp and North possessed the marijuana with the intent to distribute. Morra also argues that the evidence is insufficient to connect him to the second importation. He contends the government proved two conspiracies to import and two conspiracies to possess marijuana with the intent to distribute. Because he was not connected with the second importation, Morra argues that his conviction on the second importation charge, and the charge of continuing conspiracy to possess marijuana must be reversed. We disagree. The government's theory at trial was that there was one continuing conspiracy to import marijuana and one continuing conspiracy to possess marijuana with the intent to distribute. Morra and Fripp conspired to smuggle marijuana into the United States by ship and by helicopter and to use Joe Reams' property as the stash site. The testimony of the witnesses demonstrated that Morra and Fripp were partners and that they and North financed the importations and distributions. We believe that this evidence is sufficient for the jury to have inferred beyond a reaonable doubt that Morra engaged in the continuing conspiracy to possess marijuana as well as the second importation and possession of marijuana.

V. CONCLUSION

In conclusion, we hold that the appellants were not prejudiced by the improper jury contact, that the comments by the prosecutrix during closing argument were not improper, that the government witness' testimony was not prejudicial, that the trial court did not err in refusing to admit the collateral evidence, and that the evidence is

sufficient to support the appellants' guilt beyond a reasonable doubt. Consequently we AFFIRM the appellants' convictions.

APPENDIX B-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-3315

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMIE RICHARD ADAMS,
WILLIAM FRANCIS ELLIOTT,
JAMES HENRY MORRELL, JR.,
ELBA PINTADO OTERO,
LUCIANO MORRA,
WILLIAM HINTON HOCKADAY,
JAMES W. McMULLEN,
JERRY GRAY HOCKADAY,

Defendants-Appellants.

Appeal from the United States of District Court for the Northern District of Florida

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ON PETITIONS FOR REHEARING AND

SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 15,1986, 11 Cir., 198_, ____ F.2d ____).

(FEB 3 1987)

Before RONEY, Chief Judge, CLARK, Circuit Judge, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

( ) The Petitions for Rehearing filed by appellants Adams, Elliott and Morrell are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge